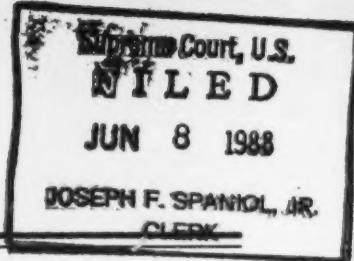


(2)
87-2022

No.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT ANDERSON, JR., *et al.*,
Petitioners,

vs.

SLATTERY GROUP, INC., *et al.*,
Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 86-2483

Robert Anderson, Jr., Louis Bank, Eugene L. Berg,
James S. Bartelsmeyer, Howard Brust, Raymond E. Copman,
John Crittendon, James L. Davis, Sr., Robert F. DeGroot,
Mathew L. DeLarber, Roland E. Doyle, Melvin C. Doyle,
Leslie M. Dunard, William J. Ehrenreich, Paul H. Eichelmann,
Frank D. Gardner, James Gurley, Victor O. Hoffman,
James W. Holman, Sidney J. Holman, William J. Huighe,
Richard H. Juergens, Oliver Karg, Jr., Harry W. Kendall,
Joseph E. Krejci, Arthur L. Marquardt, Melvin V. Meinz,
Leo H. Moll, Oliver D. Oglesby, Delbert Price, Tillman Ratty,
Albert L. Reece, John L. Rosener, August H. Rosener
Donald R. Rosso, Albert M. Scheig, Harry C. Scurlock, Sr.,
Leroy C. Seitz, Leroy H. Simmons, William Safford,
Eugene L. Turner, Fred A. Walsh, Eugene Weibking,
James D. Williams, Charles Zadow, William B. Fischer,
Charles M. Gapsch, Carl McCoy Coleman, Steve H. Dugan,
Joseph D. Goodwin, Lilburn C. DeGeare, Jack Ratty,
Edward A. Moeller, Louis F. Franke,
Stephen C. Siebenmorgen, Orville Usher, James P. Carter,
Ken Spangenberg, T.B. Whitener, Max W. Scheibe,
Chester W. Williams, Thomas N. Arengenbright, Simon Kirn,
Walter Lillicrap, Frank Mesplay, Roy W. Morrison, Sr.,
Adolpha F. Schremp, George F. Winch, Clarence E. Wright,
Leonard F. Verable and Donald S. Lillicrap,
Appellants,

v.

Alpha Portland Industries, Inc., formerly known as Alpha
Portland Cement Company, Insurance and Health Plan for
Hourly Employees, The Equitable Life Assurance Society of the
United States,

Appellees,

v.

International Brotherhood of Boilermakers, Cement, Lime, Gypsum & Allied Workers Division of International Boilermakers, Charles F. Fuch, Charles C. Huntbach, (Third Party Defendants Below),

United States of America, (Intervenor Below).

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: October 15, 1987

Filed: January 13, 1988

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BEAM*, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Plaintiffs appeal from the judgment of the district court¹ in favor of Alpha Portland Industries, Inc. (Alpha) and The Equitable Life Assurance Society of the United States (Equitable) in this case involving the Employee Retirement Income Security Act (ERISA) and the Labor Management Relations Act (LMRA). Plaintiffs are a class of former, now retired, hourly employees of Alpha's cement division. This suit developed from Alpha's decision to terminate all retiree health and life insurance benefits on May 1, 1982 when the existing collective bargaining agreement (CBA) expired. Plaintiffs alleged that the welfare benefits were vested lifetime benefits which could not be terminated. After a four day bench trial the

* The Honorable C. Arlen Beam, United States Chief District Judge for the District of Nebraska at the time this case was submitted, has since been confirmed as a Circuit Judge of this court.

¹ The Honorable William C. Hungate, United States District Judge for the Eastern District of Missouri.

district court found that the benefits were terminable because the parties to the CBA intended that the benefits only last for the duration of the CBA. 647 F.Supp. 1109 (E.D.Mo. 1986). For the reasons stated below we affirm.

I. BACKGROUND

In 1946 Alpha unilaterally created a group insurance plan for active hourly employees. In 1948 it extended limited coverage to future retirees. From 1946 through 1955 there were no formal plan documents but there were booklets describing the benefits. The 1948 booklet stated that the plan was to take effect on November 1, 1948 and that Alpha hoped "to continue the Plan indefinitely but reserves the right to change, modify, or discontinue it if future conditions make such action necessary or if reduction of Company earnings make it impossible to continue." In 1950 and 1952 the plan was revised, but each new plan contained the continuation statement found in the 1948 version.

Beginning in 1955, the terms of the plan became subject to bargaining between Alpha and the International Cement, Lime, Gypsum, and Allied Workers Union. The 1955 CBA stated that the "Group Insurance Program currently in effect shall continue in effect for the period" of the agreement. The CBA also stated that it was subject to renewal each year unless either party gave notice sixty days prior to its expiration date. The 1956, 1957, and 1958 CBAs each provided that benefits were limited to the duration of the agreement. Further, the 1956 plan booklet stated that Alpha reserved "the right to change, modify, or discontinue" the plan.

The 1959 through 1963 CBAs contained provisions stating that "the Group Insurance Plan currently in effect shall be amended" as provided. The amendments did not affect retirement benefits and contained no language relating to their duration. However, the duration of the entire agreement was limited to one year. In 1959 a booklet was issued describing the benefits

of the major medical insurance plan. The booklet stated that the group insurance contract between Alpha and The Equitable Life Assurance Society of the United States "may be altered or discontinued." The CBAs covering the period from 1963 to mid-1965 were substantially similar to those covering the previous four year period.

During negotiations over the 1965 CBA, union representatives submitted a proposal that retiree benefits be paid to the spouse and dependents of the retiree after death of the retiree, but Alpha rejected it. Thereafter an agreement was entered into which stated that the plan currently in effect would remain in effect until the effective date of the amendments. One of the amendments stated: "Future retirees' life insurance, increased from \$2,000 to \$2,500. For future retirees, Company will pay full costs of all group insurance for them and their dependents *until death of retiree*," (Emphasis added). Union negotiators believed that this clause guaranteed insurance benefits for the life of the retiree, but Alpha's negotiators understood the phrase to mean that benefits would not be paid to dependents after the retiree's death.

Beginning in 1967 the CBA existed in the form of a Basic Agreement and was supplemented by Local Agreements. The 1967 Basic Agreement became effective May 1, 1967 and continued until May 1, 1969. On the expiration date the agreement would renew itself for one year unless sixty days written notice was given by either party. The 1967 agreement provided that the plan currently in effect would remain in effect until May 1, 1968, at which time the attached amendments would take effect. The 1969 and 1971 agreements were substantially similar to the 1967 agreement.

Beginning in 1973 the CBAs contained, as an appendix, a separate Insurance and Health Agreement (I & H Agreement) that contained the terms of the plan. Each I & H Agreement was prepared by the Personnel Manager of Alpha's cement divi-

sion, Robert J. Bonstein, and sent to the Union for approval. The 1973, 1975, and 1978 CBAs each provided that the plan in effect at the expiration date of the previous agreement was to be amended as provided in the I & H Agreement. The 1973 I & H Agreement expressly stated:

This Insurance Agreement shall become effective May 1, 1973, and shall continue in effect until May 1, 1975, during which period neither the Company nor the Union may demand any change in its provisions.

After May 1, 1975, the Insurance Agreement shall be automatically renewed for successive one-year periods unless either party to the Agreement has given written notice to the other party at least sixty (60) days prior to May 1, 1975 (or any subsequent anniversary of the Effective Date of the Collective Bargaining Agreement) of its desire to amend or modify this agreement.

Both the 1975 and 1978 I & H Agreements contained duration clauses identical to the 1973 clause, except that the dates were different — the 1975 agreement was effective until May 1, 1978 and the 1978 agreement was effective until May 1, 1981.

Article I of the 1973, 1975, and 1978 I & H Agreements stated that retiree insurance benefits could be altered:

Insurance coverages under the Prior Programs not hereinafter provided shall be continued to the extent applicable to Retirees and their Dependents in accordance with the provisions of the Prior Programs as if fully set out herein and as the same may now or hereinafter be amended, modified or supplemented in collective bargaining between the parties.

Also, each agreement provided for coordination of benefits whereby the benefits Alpha paid were reduced by amounts retirees received from other sources such as Medicare.

In 1978 hourly employees were provided a summary plan description (SPD) for the plan. The SPD provided, in part, that “[i]f you retire with 10 or more years of service on or after May 1, 1976, you will continue to receive the Hospital/Surgical and Major Medical portion of plan coverage. *Coverage will continue for the remainder of your life.*” (Emphasis added). The SPD also provided that retirees with 10 or more years of service “will continue to receive \$4,000 in Company-sponsored life insurance.”

On April 31, 1981 the 1978 CBA with the attached I & H Agreement was due to expire, but the parties agreed to extend the existing terms for an additional year. During this period Alpha was experiencing increasing financial difficulties. Alpha's cement division had an operating loss of almost \$17 million in 1980 and 1981. Total losses, including plant closings, exceeded \$60 million. In 1981 Alpha closed four of its cement plants and by the end of 1982 all of its cement plants were closed.

On March 29, 1982 Alpha sent letters to all of its retired hourly employees stating that it was cancelling their insurance coverage as of May 1, 1982, following the expiration of the current CBA and I & H Agreement. On May 1 Alpha ceased providing insurance benefits for retirees.

Plaintiffs brought suit in the United States District Court for the Eastern District of Missouri alleging violations of ERISA and the LMRA. The district court dismissed the case, holding that plaintiff's claims are subject to arbitration, 558 F.Supp. 913 (E.D. Mo. 1982). A panel of this court reversed, 727 F.2d 177 (8th Cir. 1984), and upon rehearing en banc the district court again was reversed and the case remanded for trial. *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293 (8th Cir.) (*Anderson I*), cert. denied, 471 U.S. 1102 (1985).

During the four day bench trial, the district court heard conflicting testimony about whether retiree benefits were vested for

the lifetime of the retiree. Aside from the language in the plan documents, summarized above, the district court also heard other evidence on the issue of intent. For example, union members, including those involved in negotiating the 1975 and 1978 agreements, testified that they had been told by a now deceased Alpha representative that their retirement benefits lasted for life. Plaintiffs introduced into evidence letters drafted by Bonstein and sent to new retirees which stated that “[y]our life insurance will be continued in the amount of _____. * * * Alpha group hospital and surgical insurances for you and your eligible dependents will be continued. * * * Major medical expense benefits will be provided up to a lifetime maximum of _____. ”

Evidence was produced by Alpha showing that after 1975, the effective date of ERISA, if retiree benefits were to extend beyond the duration of the CBA, it was customary for the plan documents to explicitly state this. Also, International Union President Thomas Miechur (by deposition) and Bonstein testified that under the language they prepared and agreed upon, retiree welfare benefits were not guaranteed beyond the expiration of the CBA.

Miechur's position was corroborated by letters he sent to retirees following Alpha's decision to terminate benefits:

The termination of the retirees' insurance coverage by the company is a traumatic experience for all retirees. I fully understand the impact the termination of insurance benefits has on retirees, and I wish there was something that could be done to provide continued coverage, but under the circumstances there is nothing that the Union can do. There is nothing in the collective bargaining agreement itself, or in the Insurance and Health Agreement which guarantees retirees' benefits for life, nor is there any language in these agreements that talks about vesting of these benefits, and these benefits will expire of their own force on May 1, 1982.

Pensions, unlike health and welfare benefits, are paid from an actuarially predetermined fund and are guaranteed for life. Health and welfare benefits are negotiated periodically and are paid for by the employer contributions and last only for the life of a collective bargaining agreement.

The district court weighed this and other evidence and concluded that retiree welfare benefits were not vested for life and entered judgment in favor of Alpha. The court further held that Equitable was not a necessary party to the lawsuit and entered judgment in its favor.

II. DISCUSSION

On appeal plaintiffs raise numerous issues which fall into four general categories. They argue that: 1) the district court erroneously concluded that retiree health and life insurance benefits were not vested for the lifetime of the retiree; 2) the district court erroneously deprived them of a jury trial; 3) the district court committed several errors when conducting the proceedings; and 4) the district court erroneously concluded that Equitable is not a necessary party.

A . Duration of Benefits

In 1974 the Employee Retirement Income Security Act, 29 U.S.C. §1001 *et seq.* (1982), was enacted to "protect interstate commerce and the interests of participants in employee benefit plans" by establishing disclosure and reporting requirements, standards of conduct for plan fiduciaries, and access to federal courts. 29 U.S.C. §1001(b). "Employee benefit plans" are divided into two distinct categories: welfare plans and pension plans. In general, welfare plans are maintained to provide "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment * * * * " 29 U.S.C. §1002(1). Pension plans, however, "(i) provide[] retirement income to employees, or (ii) result[] in a

deferral of income by employees for periods extending to the termination of covered employment or beyond * * * * " 29 U.S.C. § 1002(2)(A).

Aside from the difference in their purposes, welfare and pension plans also differ in another critical way. While pension plans are subject to ERISA's stringent vesting requirements, 29 U.S.C. § 1053 ("[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is non-forfeitable upon the attainment of normal retirement age"), welfare plans are specifically exempt from such requirements. 29 U.S.C. § 1051. *See generally Anderson v. John Morrell & Co.*, 830 F.2d 872, 876 (8th Cir. 1987).

Since welfare benefits do not automatically vest as a matter of law, *see, e.g., Molnar v. Wibbelt*, 789 F.2d 244, 250 (3rd Cir. 1986), we must determine whether "the parties intended [that] retirees' benefits would be vested and not tied to the agreement which created them." *UFCW Local 105-A v. Dubuque Packing Co.*, 756 F.2d 66, 70 (8th Cir. 1985). The exemption from ERISA's vesting requirements does not prohibit an employer from extending benefits beyond the expiration of the collective bargaining agreement. Rather, the exemption allows the parties to determine the duration of the welfare benefits. Thus, the issue is "simply one of contract interpretation." *Id.*

Plaintiffs argue that once they showed that retirees were given welfare benefits, Alpha had the burden of showing that the benefits were for a limited duration. Plaintiffs principally rely on the decision of the Sixth Circuit in *International Union, United Auto., Aero, and Agric. Implement Workers of America v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). In *Yard-Man* the court stated that:

retiree [welfare] benefits are in a sense 'status' benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained.

Thus, when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree. This is not to say that retiree insurance benefits are necessarily interminable by their nature. Nor does any federal labor policy identified to this Court presumptively favor the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent. Rather, as part of the context from which the collective bargaining agreement arose, the nature of such benefits simply provides another inference of intent. Standing alone, this factor would be insufficient to find an intent to create interminable benefits. In the present case, however, this contextual factor buttresses the already sufficient evidence of such intent in the language of the agreement itself.

Id. at 1482 (emphasis added).

We disagree with the plaintiffs for several reasons. First, assuming we recognize an inference in favor of vesting, the burden of proof still remains on the plaintiffs. Shortly after *Yard-Man* was decided the Sixth Circuit stated that "there is no legal presumption based on the status of retired employees." *International Union, United Auto., Aero. and Agric. Implement Workers of America v. Cadillac Malleable Iron Co.*, 728 F.2d 807, 808 (6th Cir. 1984). Inferences do not shift the burden of proof.

Second, we disagree with *Yard-Man* to the extent that it recognizes an inference of an intent to vest. Congress explicitly exempted welfare benefits from ERISA's vesting requirements. It, therefore, seems illogical to infer an intent to vest welfare benefits in every situation where an employee is eligible to receive them on the day he retires. The court in *Yard-Man* recognized that no federal labor policy presumptively favors vesting. Because Congress has taken a neutral position on this

issue “traditional rules for contractual interpretation are applied as long as their application is consistent with federal labor policies.” *Yard-Man*, 716 F.2d at 1479. We believe that it is not at all inconsistent with labor policy to require plaintiffs to prove their case without the aid of gratuitous inferences. Further, our holding today is consistent with previous opinions of this court. For example, in *Morrell*, this court stated that:

The gist of [plaintiff’s] claim is that the employer’s oral statement to individual employees of its “policy” became a contract to maintain and improve the plan when the employees thereafter performed service. Yet if that be so, it would equally follow that an employer’s announcement of any plan to pay welfare benefits would become a contract to maintain the plan indefinitely upon the performance of service by employees. Congress, however, did not intend that result. Doubtless it is consistent with the intent of Congress for an employer to undertake such an obligation if it elects to do so. We conclude, however, that to accomplish that result, there must be a specific, if not written, expression of the employer’s intent to be bound.

830 F.2d at 877. *See also Dubuque Packing*, 756 F.2d at 70 (burden is on plaintiff to prove that benefits are vested).

Proper allocation of the burden of proof in this case leads to the conclusion that the district court correctly held that retiree welfare benefits were intended to last only for the duration of the CBA.

It is axiomatic that when interpreting a contract, or in this case a CBA, we must begin by examining the language of the documents which form the basis of the agreement. *See Yard-Man* 716 F.2d at 1479. “[I]f the contract is deemed ambiguous, then the court may weigh extrinsic circumstances to aid in its construction.” *Dubuque Packing*, 756 F.2d at 69. Because the district court considered extrinsic evidence, we will assume the court found the language in the documents ambiguous.

Plaintiffs' argument that retiree welfare benefits were vested falls into two categories: pre-1973 agreements and post-1973 agreements.

1. Pre-1973

Prior to 1973, retiree welfare benefits were provided for by the CBA although the actual terms were contained in group insurance policies. Plaintiffs focus on the language in the 1965 CBA which stated that "[f]or future retirees, Company will pay full costs of all group insurance for them and their dependents until death of retiree." Viewed in a vacuum this language is highly probative of intent to vest benefits, but when viewed in the context of the events surrounding its adoption it is less significant. At trial Alpha produced evidence showing that the phrase reflected Alpha's rejection of a union proposal that retirees' dependents' benefits would be continued beyond the death of the retiree.² Further evidence showed that during the term of the 1965 CBA five Alpha local unions agreed to coordination of benefits with Medicare. The agreement applied to persons already retired and thus was consistent with plaintiffs' theories of vesting.

Aside from the phrase "until death" in the 1965 CBA, no credible evidence of intent to vest exists in the pre-1973 period.

² This construction is not inconsistent with *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986), wherein a district court's interpretation of similar language was overturned on appeal. In *Policy* the agreement provided for the continuation of benefits "for the pensioner and his spouse, if any, during the life of the pensioner at no cost to the pensioner." *Id.* at 616. The district court interpreted the phrase to cut off dependent coverage at the pensioner's death rather than guarantee lifetime benefits to the pensioner. The Sixth Circuit disagreed because the district court's interpretation would have lead to the anomalous result that the spouse would receive benefits at no cost while the pensioner would have to pay. *Id.* The result reached in the present case, however, presents no such problem.

From 1946 through 1955 Alpha “reserve[d] the right to change, modify, or discontinue [the group insurance plan] if future conditions make such action necessary or if reduction of Company earnings make it impossible to continue.” The 1956, 1957, and 1958 CBAs limited benefits to the duration of the agreement and the 1956 Plan Booklet stated that Alpha reserved the right to discontinue the plan. The 1959 through 1963 CBAs each had a one year duration and a booklet issued in 1959 stated that the group insurance plan “may be altered or discontinued.” The 1967, 1969, and 1971 Basic Agreements also were of limited duration. In short, nothing prior to the adoption of the I & H Agreements proves that vesting was intended.³

2. Post-1973

Beginning in 1973 retiree welfare benefits were embodied in I & H Agreements which were appended to the CBA. The relevant portions of these agreements are set forth in the factual statement. The district court held that the agreements reflect an intent to limit benefits to the duration of the then effective agreement because each agreement: 1) states that benefits previously provided would be continued; 2) provides that its terms are subject to amendment, modification, or supplementation at later bargaining sessions; 3) has an explicit duration clause limiting its duration; and 4) contains a coordination of benefits clause which is inconsistent with a theory of vesting. 647 F.Supp. at 1126-27. We agree with each of the district court’s conclusions.

³ Plaintiffs note that during two strikes Alpha continued to pay retiree welfare benefits. While payment of benefits during a strike may show that benefits were thought to be vested, *Bower v. Bunker Hill, Co.*, 725 F.2d 1221, 1225 (9th Cir. 1984), the facts in this case do not support such a conclusion. During the 1957 strike, benefits were continued for retirees as well as for all striking employees. Similarly, in 1965 some of the striking employees were also provided benefits during the strike. The fact that Alpha treated retirees and striking employees equally negates any inference of intent to vest retiree benefits.

First, we agree that *Dubuque Packing* is distinguishable. In *Dubuque Packing* the 1973 and 1976 agreements reaffirmed and continued the retiree benefits established in the previous agreements. However, although the 1979 agreement did not contain reaffirmation and continuation language, the company continued paying the benefits of pre-1979 retirees. This court found that the continuation of benefits was evidence that the benefits were vested. In the present case, however, each I & H Agreement provided for continuation of benefits from the previous plan. Were there an intent to vest, continuation language would not be necessary. *See International Union (UAW) v. Roblin Industries*, 561 F.Supp. 288, 298 (W.D. Mich. 1983).⁴

Second, the provision of the I & H Agreement allowing amendment, modification, or supplementation is inconsistent with plaintiffs' argument that benefits were vested for life. *See Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 330 (3rd Cir. 1984).

Third, the specific durational clauses in the I & H Agreements show an intent to limit benefits to the duration of the agreement. It would render the durational clauses nugatory to hold that benefits continue for life even though the agreement which provides the benefits expires on a certain date. Plaintiffs argue that benefits are non-terminable because the word "terminate" does not appear. However, they cite nothing to support this

⁴ Plaintiffs erroneously cite *Upholsterers' Int'l Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967), for the proposition that language providing for continuation of prior programs indicates an intent to vest. The case merely states that the word "continue" as used therein was ambiguous and needed to be supplemented by extrinsic evidence.

argument.³ The question before us is not whether any specific words appear, but whether the parties intended benefits to vest. Intent, or lack thereof, may be proved in more ways than one, and the absence of the word "terminate", while relevant to our inquiry, certainly is not dispositive. *See Struble*, 732 F.2d at 330-31 (benefits expired at end of agreement even though the word "terminate" did not appear in agreement).

Fourth, coordination of benefits is inconsistent with vesting. When interpreting a contract we must not interpret one provision inconsistently with another. *Yard-Man*, 716 F.2d at 1479-80. The coordination of benefits provision in the I & H Agreements reduces benefits to be paid to all retirees. We agree with the district court that "the Plan cannot be interpreted to provide vested rights for prior retirees in one provision and to take such rights away in another." 647 F.Supp. at 1127.

Plaintiffs also rely on the statement in the 1978 SPD that "[c]overage will continue for the remainder of your life." The district court held that based on the clarity of later I & H Agreements and the conduct of the parties, very little weight would be given to the statement. 647 F.Supp. at 1127. Because the district court's interpretation was based largely on the credibility of the witnesses presented by both parties, and because plaintiffs have not convinced us that the district court erred, we believe that the court correctly held that the 1978 SPD statement is not controlling in light of substantial contra evidence showing no intent to vest benefits.

³ Plaintiffs contend that this court in *Dubuque Packing* demanded that the phrase "terminate retirement benefits" explicitly appear in an agreement before the benefits will be construed as terminable. However, nowhere in the opinion does the phrase "terminate retirement benefits" appear. The closest language — "[t]here is no evidence that the parties agreed to *terminate retirees' benefits*" — falls far short of establishing the bright line test plaintiffs would have us apply in this case. *Dubuque Packing*, 756 F.2d at 69 (emphasis added).

Plaintiffs further argue that they are entitled to recover under the 1978 SPD alone, independent of the CBAs and I & H Agreements. They base their claim on 29 U.S.C. §1022 which provides, in pertinent part:

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.

* * *

(b) The plan description and summary plan description shall contain the following information: * * * circumstances which may result in disqualification, ineligibility, or denial or loss of benefits * * *

Plaintiffs argue that under the 1978 SPD they are entitled to lifetime benefits because 1) the SPD failed to specify the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits" and 2) the SPD guarantees benefits for life.

This court stated that "[t]o secure relief on the basis of a faulty summary plan description, the claimant must show some significant reliance on, or possible prejudice flowing from the summary." *Lee v. Union Electric Co.*, 789 F.2d 1303, 1308 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 460 (1986). *See also Govoni v. Bricklayers, Masons & Plasterers*, 732 F.2d 250, 252 (1st Cir. 1984). Plaintiffs argue that these cases are inapposite because the SPD in the present case is not "faulty." We disagree, because to the extent plaintiffs argue that the SPD provides lifetime benefits, and therefore is inconsistent with the I & H Agreements, it necessarily must be faulty. ERISA states that

the SPD must “apprise [the] participants and beneficiaries of their rights and obligations under the plan * * * *” If, as plaintiffs argue, the SPD fails to do this, it is faulty.

Plaintiffs further argue that they need not show detrimental reliance to recover under the SPD, citing *Monson v. Century Mfg. Co.*, 739 F.2d 1293 (8th Cir. 1984). In *Monson*, this court stated that “[l]ogically, evidence of detrimental reliance must show that plaintiffs took action, resulting in some detriment, that they would not [otherwise] have taken.” *Id.* at 1302. The court further stated that reliance could “be inferred from the defendants’ countless representations that the profit sharing program provided a strong incentive for the employees to do extra work and to stay with the company.” *Id.* Plaintiffs argue that reliance may also be inferred in the present case. We have reviewed the arguments and briefs of the parties and the record before us and conclude that reliance should not be inferred in this case. Plaintiffs direct us to nothing from which reliance may be inferred. We believe that *Monson* is not controlling in the present case because the facts in *Monson* readily supported an inference of reliance. The plaintiffs in *Monson* were repeatedly told that fifty per cent of the company’s profits were to be contributed to the employee profit sharing program and that they could directly increase the contributions by working harder. In the present case, however absent some evidence of reliance, it would be improper to infer that any of the plaintiffs relied to their detriment on the SPD.

Finally, contrary to plaintiffs’ assertions this case does not involve breach of fiduciary duties,⁶ unauthorized amendments, or

⁶ The district court held that plaintiffs did not plead breach of fiduciary duty, 647 F.2d at 1128, and we agree. Further, it would be ludicrous to hold that Alpha breached its fiduciary duties when it discontinued benefits which were no longer required under the applicable agreements. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986) (“ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued”), cert. denied, 107 S.Ct. 1893 (1987).

unilateral termination of a benefit plan. It merely involves a decision by Alpha not to renew retiree welfare benefits which by their own terms have expired. The benefits have neither been terminated nor amended; they simply have expired.

B. Jury Trial

Plaintiffs next argue that pursuant to §301 of the National Labor Relations Act, 29 U.S.C. §185, they were entitled to trial before a jury and that under ERISA they are entitled to a jury trial on the separate breach of contract issue. Alpha contends that plaintiffs have no right to a jury trial because their claim is equitable in nature. We need not resolve this dispute because we believe plaintiffs waived any right to a jury trial on the issue of liability. Only if the court found for plaintiffs on the issue of liability would a jury have been required to assess damages. Plaintiffs agreed to a bifurcated trial and that is what they received. Consider the following conversation between the court and plaintiffs' counsel:

THE COURT: Well, the way the court would see it, *the court tries the case. If there should be no liability, we all go home.* If there is liability, then the court would fashion a remedy as to the part that is equitable and the part that is damages. If he's right in his position, that it's 301 related and it is damages and that there are cases would require — that and that only, on that portion of it, would go to the jury.

PLAINTIFFS' COUNSEL: *That's exactly our position.*

(Emphasis added).

C. Other Errors

Plaintiffs also argue that the trial judge committed numerous errors when conducting the proceedings below. Only a few of the alleged errors merit discussion and of those, none warrant the relief sought by plaintiffs.

For example, plaintiffs argue that the court erred in denying their July 3, 1985 motion to amend their complaint. The decision whether to allow amendment of a complaint is left to the sound discretion of the district court and will be reversed only if that discretion is abused. *Niagra of Wisconsin Paper Corp. v. Paper Industry*, 800 F.2d 742, 749 (8th Cir. 1986). In the present case plaintiffs' motion was filed more than three years after suit was initially filed, ten days before the then effective discovery cut off date, and two months prior to the projected trial date. Under these circumstances, the district court did not abuse its discretion.

Plaintiffs also argue that the district court set an "oppressive thirty-day schedule" for completion of discovery upon remand. Plaintiffs fail to note, however, that they never sought relief from the schedule set by the court and that when Alpha filed a motion for an extention of time they countered with a motion in opposition.

Further, plaintiffs argue that the district court erred in failing to recuse himself. We have reviewed the allegations made by the plaintiffs and have found nothing indicating that the district court was less than impartial.⁷

Finally, we note that the fifty page limit on the length of briefs filed in this court must be followed. Plaintiffs' counsel's use of 189 single-spaced footnotes in his fifty page brief violates the spirit, if not the letter, of Fed. R. App. P.28(g) and 32(a) and 8th Cir. R. 8(e). In all cases where additional space is needed, permission of the court should be requested.

⁷ Plaintiffs other allegations of error have been considered and have been found to be without merit. Also, our disposition of this case makes it unnecessary for us to decide whether the district court correctly dismissed the Equitable Life Assurance Society of the United States.

III. CONCLUSION

After careful review of the arguments of the parties, we affirm the judgment of the district court. Plaintiffs failed to carry their burden of proof and prove that retiree welfare benefits were intended to last for the life of the retiree. Also, the district court did not err in denying plaintiffs a jury trial or in conducting the proceedings below.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

No. 82-1413C(3)

**Robert Anderson, Jr. et al.,
Plaintiffs,**

v.

**Alpha Portland Industries, Inc. et al.,
Defendants.**

JUDGMENT

Findings of fact and conclusions of law dated this day are hereby incorporated into and made a part of this judgment.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiffs take nothing by their cause of action, that the action be dismissed on the merits, and that the defendants recover of the plaintiffs defendants' costs of action.

IT IS HEREBY FURTHER ORDERED that the parties' motions for directed verdict be and the same are denied.

Dated this 30th day of September, 1986.

/s/ William C. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-1413C(3)

Robert Anderson, Jr. et al.,
Plaintiffs,

v.

Alpha Portland Industries, Inc. et al.,
Defendants.

MEMORANDUM

This matter is before the Court after a four-day nonjury trial to determine defendants' liability with respect to the merits of class plaintiffs' claims.¹

Pursuant to the Labor Management Relations Act (LMRA) and the Employee Retirement Income Security Act (ERISA), named plaintiffs, retired hourly employees of defendant Alpha Portland Industries, Inc. (Alpha), in general seek on behalf of themselves and a class relief for defendants' allegedly improper termination of life and health insurance benefits previously provided to Alpha retirees and their dependents pursuant to the defendant Insurance and Health Plan for Hourly Employees, Alpha Portland Cement Company (Plan). Defendant The Equitable Life Assurance Society of the United States (Equitable) provided and participated in the administration of the policies at issue here. Defendants deny liability.

Having carefully considered the record herein, including the pleadings, the parties' joint stipulation of uncontested facts, the

¹ The Court does not now have before it the plaintiff-intervenor United States' claims, the third-party claims filed by defendant Alpha and defendant Plan, or plaintiffs' requests for relief. Such matters have been bifurcated for later, separate consideration, if necessary.

relevant exhibits and testimony, and the parties' argument, the Court hereby makes and enters the following findings of fact and conclusions of law.

Findings of Fact

1. Prior to their retirement, named plaintiffs each worked as an hourly employee of the cement division of defendant Alpha Portland Industries, Inc. (Alpha).
2. Defendant Alpha was at all relevant times a corporation and an employer engaged in commerce and in activities affecting commerce. Until 1972, defendant Alpha was known as Alpha Portland Cement Company, and since 1985 it was known as Slattery Group, Inc.
3. In 1946, defendant Alpha unilaterally created the defendant insurance and Health Plan for Hourly Employees, Alpha Portland Cement Company (Plan). The Plan covered only hourly workers and hourly retirees from Alpha's cement plants.
4. Defendant The Equitable Life Assurance Society of the United States (Equitable) participated in the administration of the Plan.
5. Named plaintiffs represent a certified class consisting of:
 - A. All persons defined as retirees under the terms of Alpha Portland Industries, Inc.'s Insurance and Health Plan for Hourly Employees (Plan), whose benefits were terminated under said Plan by defendants on or after May 1, 1982.
 - B. All beneficiaries under the terms of the Plan who would have been entitled to receive benefits under the Plan by reason of their relationship to retirees, whose entitlement to benefits from and after May 1, 1982, was terminated by defendants.
 - C. Kin of deceased retirees and of deceased beneficiaries entitled to benefits under the terms of said Plan by reason

of familial relationship to retirees, where the death occurred on or after May 1, 1982. (This class includes the surviving spouse and if no surviving spouse, the children of the deceased retiree or deceased beneficiary.)

6. At the time of their respective retirements from Alpha, named plaintiffs and members of the first plaintiff subclass were eligible to receive health and life insurance provided to hourly retirees under the terms of the Plan then in effect. When this litigation began, there were approximately 453 retirees covered by the Plan. This total includes retirees from Alpha's cement plants in St. Louis, Missouri; Orange, Texas; Birmingham, Alabama; Lime Kiln, Maryland, Cementon, New York; Jamesville, New York; Martin's Creek, Pennsylvania; LaSalle, Illinois; and Ironton, Ohio.²

7. From 1946 until 1955, Alpha unilaterally continued and modified the Plan. During this period, there were no formal Plan documents but there were booklets describing the benefit programs.

8. The 1946 Plan booklet did not contain provisions directed explicitly to retired employees. No term of duration was set forth in this booklet.

9. As revised in 1948, the Plan booklet stated that after retirement, if the employee was qualified as specified, life insurance under the Plan could continue in one-half the amount provided to working hourly employees. Booklet for Plan Revised November 1, 1948, at pages 8 and 2. The booklet stated the Plan would become effective, if at all, on November 1, 1948. Alpha explicitly stated in the booklet that the company hoped

² Plaintiffs and defendants stipulated that, for purposes of the liability determination, there are no retirees from Alpha's cement plant at Manheim, West Virginia, and there were none as of May 1, 1982.

to continue the Plan indefinitely but reserves the right to change, modify, or discontinue it if future conditions make such action necessary or if reduction of Company earnings make it impossible to continue.

Id. at 7 (continuation statement).

10. As revised in 1950, the booklet stated that qualified retirees would "have the privilege of continuing one-half the amount of their Group Life Insurance for which they were insured immediately prior to retirement." Plan Booklet-Revised November 1, 1950, at 9. The booklet also provided that:

Employees who retire with the consent of the Alpha Company will have the privilege of continuing their Hospitalization and Surgical Insurance for themselves and dependents. However, the Hospital Benefits for each covered person will be limited to a total of 31 days in any calendar year and Surgical Expense Benefits not to exceed one maximum surgical claim in any calendar year.

Id. at 14. This booklet stated the Plan revisions "will become effective November 1, 1950," and had the same "continuation statement" as the 1948 booklet. *Id.* at 8.

11. As revised in 1952, the booklet stated the life insurance benefits provided to hourly employees could continue for hourly employees who retired if they had attained fifteen years of continuous service, rather than the twenty-five years of service required before the 1952 revision. November 1, 1952, Plan Booklet at 8-9. That booklet also contained a hospital and surgical expense benefit provision identical to the one in the 1950 booklet except that hospital benefits for each covered person were

limited to a total of 31 days and a maximum reimbursement for additional charges not to exceed \$100 in any one calendar year and Surgical Expense Benefits may not exceed one maximum surgical claim in any calendar year.

Id. at 13-14. The 1952 booklet stated the revised Plan "will become effective on November 1, 1952;" and had the same continuation statement as the 1948 and 1950 booklets. *Id.* at 7; 3.

12. These booklets did not contain specific eligibility requirements for retired employees, although such requirements were set forth for other employees and their dependents. *See* 1946 Plan Booklet at 4; 1948 Plan Booklet at 6; 1950 Plan Booklet at 7; 1952 Plan Booklet at 6.

The 1946, 1948, 1950, and 1952 booklets stated Equitable underwrote the policies and provided that Equitable would determine the amounts paid for "cutting operations" not listed within the booklets. 1946 Plan Booklet at 1, 9; 1948 Plan Booklet at 2, 12; 1950 Plan Booklet at 4, 12-13; 1952 Plan Booklet at 3, 12.

Each booklet stated the relevant Plan was funded by contributions from the employees and the company. 1946 Plan Booklet at 1, 2, 5; 1948 Booklet at 3, 5, 7; 1950 Plan Booklet at 4, 5, 8; 1952 Plan Booklet at 3, 4, 7. The insured employees received certificates evidencing the insurance and were referred to the "terms and provisions of the Group Insurance contracts" between Equitable and Alpha to resolve questions relating to the Plan. 1946 Plan Booklet at 4, 20; 1948 Plan Booklet at 7, 24; 1950 Plan Booklet at 7, 24; 1952 Plan Booklet at 7, 24.

13. From 1955 until 1982, Alpha, the International Cement, Lime, Gypsum and Allied Workers Union (union), and the union's Alpha locals negotiated concerning the Plan.

14. In 1955, the "safety and welfare" section of the collective bargaining agreements (CBA) between Alpha and its locals stated that the "Group Insurance Program currently in effect shall continue in effect for the period" of the CBA. Each collective bargaining agreement stated its term began when both parties signed it, continued until a date specified (being one year later), "and each year thereafter unless sixty (60) days' notice is given in writing by either party prior to any expiration date."

The "safety and welfare" section of the CBAs for 1956, 1957, and 1958 provided that the "Group Insurance plan agreed upon at the time of signing this agreement shall continue in effect for the period" of each CBA. Each CBA had the same "term of agreement" provision as the 1955 CBAs.

15. The booklet for the Plan revised as of May 1, 1956,

(a) set forth explicit eligibility provisions for "employees," "new employees," "regular employees," and "dependents," 1956 Plan Booklet at 4;

(b) contained a statement that the "increased Benefits became effective on the effective date of your 1956 union contract;"

(c) stated that:

The Alpha company hopes to continue the Plan indefinitely but reserves the right to change, modify, or discontinue it if future conditions make such action necessary or if reduction of Alpha Company earnings make it impossible to continue, except where continuance is specified by union contract.

Id.;

16. In the "safety and welfare" section of the CBAs effective from 1959 until 1963, there were provisions stating that "the Group Insurance Plan currently in effect shall be amended" by certain specified provisions. These provisions contained no specific reference to retirement benefits. Unlike the earlier CBAs, these CBAs did not say the Plan then in effect "continued" and did not otherwise state there was a fixed duration to any insurance plan deemed to be in effect. The record does not reflect that benefits under the Plan were not disbursed or received between 1959 and 1963. The CBAs between Alpha and its locals for this time period contained the same type of "term of agreement" provision set forth in the earlier CBAs, although the term was for more than one year.

17. In 1959, a booklet regarding "The Alpha Major Medical Expense Insurance Plan" was issued for this new plan, supplementing the hospital and surgical benefits. This insurance plan booklet stated the Plan's benefits (including a "maximum lifetime benefit for any individual [of] \$5,000 for expenses incurred for the same or related causes,") "ceases on termination of your active employment with Alpha." *Id.* at 4. This booklet expressly stated that decisions on legal interpretation would be "based upon the terms of the Group Insurance contracts between [Equitable and Alpha], which contracts may be altered or discontinued."

18. As revised for August 1, 1961, the Plan booklet provided as follows:

Retirement

Upon your retirement with the consent of the company, you may continue:

1. \$2,000 of your group life insurance, if you have completed 15 years of continuous service at the time of retirement, at a monthly cost of \$1.00.
2. Hospital expense and surgical expense insurances on yourself and your dependents. However, in a calendar year, hospital room and board benefits will be limited to a maximum of \$13 per day for a total of 60 days and reimbursement for additional charges will be limited to \$300. Surgical expense benefits may not exceed \$250 in a calendar year. These benefits apply to each insured member of a family separately. Any number of confinements or operations may make up these maximums. Your monthly cost for these hospital expense and surgical expense insurances is:

\$.80 for you, or

2.24 for you and your wife, or

2.90 for you, your wife and your children.

1961 Plan Booklet at 14-15. The booklet noted that Alpha paid the full cost of the employees' insurance and most of the dependents' insurance; stated that a certificate containing "complete details of the benefits provided under this plan" would be issued; and stated the "[g]roup insurance for you and your dependents terminates upon termination of your active service except as previously discussed." *Id.* at 1, 13, 15. In its introduction, the booklet also stated "[t]he exact provisions of the plan are contained in the contracts between" Equitable and Alpha.

19. The "safety and welfare" section of the CBAs between Alpha and its union's locals for the period from 1963 until mid-1965 stated that "the Group Insurance Plan currently in effect" would be amended as specified. The noted changes explicitly included enhanced coverage for future retired employees. As with the 1959 through 1963 CBAs, the 1963-1965 CBAs did not say the Plan then in effect "continued," and did not otherwise state there was a fixed duration to any insurance plan deemed to be in effect. The record does not reflect that benefits under the Plan were not disbursed or received between 1963 and 1965. The CBAs for this period also contained the same type of "term of agreement" provision set forth in the CBAs effective from 1959-1961 and 1961-1963.

20. In the booklet for the Plan revised as of August 1, 1963, the only provision expressly related to retired employee benefits stated:

Upon your retirement with the consent of the company, you may continue:

1. \$2,000 of your group life insurance, if you have completed 15 years of continuous service at the time of retirement, at a monthly cost of \$1.00.
2. Hospital expense, surgical expense and major medical expense insurances on yourself and your dependents.

However, in a calendar year, hospital room and board benefits will be limited to a maximum of \$18 per day for a total of 70 days and reimbursement for additional charges will be limited to \$360. Surgical expense benefits may not exceed \$300 in a calendar year. Major medical expense benefits will be limited to a lifetime maximum of \$2500 for all causes. These benefits apply to each insured member of a family separately. All other provisions will continue to apply. Your monthly cost for these expense insurances is:

\$.80 for your, or

2.24 for you and your wife, or

2.90 for your, your wife and your children.

Booklet for August 1, 1963, Plan at 14-15.

21. With respect to hospital, medical, and surgical coverage, the local unions' proposals submitted to Alpha for negotiation in 1965 had suggested "[t]he same hospital, medical and surgical coverage for retired employee and his dependents as is carried by the active employees. This coverage to continue on the spouse and dependents after the retiree's death."

In the CBAs effective from 1965 through 1967, the "safety and welfare" section explicitly provided "[t]he Group Insurance Plan currently in effect will remain in effect until May 1, 1966 and then will be amended as provided in Appendix 'A' attached." In relevant part, Appendix A stated:

1. Future retirees' life insurance, increased from \$2,000 to \$2,500. For future retirees, Company will pay full costs of all group insurance for them and their dependents until death of retiree.

* * *

M. Hospital, Medical and Surgical benefits for future retirees and their dependents shall be increased by the following.

1. Hospital room charges up to semi-private rate for 120 days; \$700 extras; \$350 surgical schedule. These benefits to be on a calendar year basis.
2. The present 15 years of continuous service eligibility requirement for retiree insurance coverage reduced to 10 years of continuous service.

No Plan booklet was issued to reflect these changes.

Union negotiators who testified stated that after the 1965-67 CBAs were adopted by Alpha and its union's locals, the union representatives informed their locals or understood from Alpha's representatives that insurance benefits continued for life. Alpha's negotiating representative understood the phrase "until death" in Appendix A of the 1965-67 CBA to mean the benefits would not be paid to dependents after the retiree's death.

22. In 1966, Alpha and its union's locals entered into "memorand[a] of understanding regarding group insurance medicare." In relevant part, these memoranda provided as follows for the coordination of benefits granted through the Plan and through Medicare:

In the event that an employee, retiree or a dependent thereof, is eligible for benefits under any Federal Program of Hospital, Medical and Surgical care for the aged, the Hospital, Medical and Surgical Benefits under the plan provided by the company shall be payable only to the extent that such benefits under the plan exceed those provided under the Federal Program and there shall be no duplication of benefits.³

³ Only the memorandum between Local 43 and Alpha expressly stated that "[c]ompany group insurance plans currently covering employees, retired employees and dependents of employees and retired employees and the plans effective May 1, 1966 shall remain unaltered."

23. Beginning in 1967, Alpha and the union entered into a "Basic Agreement" as the CBA, with "Local [Supplemental] Agreements" amending the Basic Agreement as necessary based upon conditions at the local plant. The preamble to the Basic Agreement for 1967 to 1969 explicitly stated: "[i]n the event of the sale or lease by the Company of a plant covered by this agreement or in the event the Company is taken over by sale, lease assignment, receivership or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this agreement for the life thereof." This provision was not in the preamble for the Basic Agreements covering 1969-1971, 1971-1973, 1973-1975, and 1975-1978.

24. The "safety and welfare" section of the 1967-1969 Basic Agreement stated in pertinent part that "[t]he group insurance plan currently in effect will remain in effect until May 1, 1968 and then will be amended as provided in Appendix 'B' attached." Appendix B did not contain any changes expressly related to benefits for retired employees. The section also set forth amendments in the Plan effective May 1, 1967, including a provision that "[a]ny group insurance coverage to retirees shall be continued to employees who retire" at the lower age of 55 as allowed by amendment to the pension plan. This Basic Agreement stated it

shall become effective May 1, 1967, except as otherwise noted, and shall continue in effect until May 1, 1969, and each year thereafter unless sixty (60) days' notice is given in writing by either party prior to any expiration date.

25. With respect to retirement life insurance and health benefits, the booklet for the Plan as revised for May 1, 1968, provided as follows:

Upon your retirement with the consent of the company, you may continue:

1. \$2,500 of your group life insurance, if you have completed 10 years of continuous service at the time of retirement.

2. Hospital expense, surgical expense and major medical expense insurances on yourself and your dependents. However, in a calendar year, hospital room and board benefits will be limited to the hospital's regular charge for semi-private accommodations for a total of 120 days and reimbursement for additional charges will be limited to \$700. Surgical expense benefits may not exceed \$375 in a calendar year. Major medical expense benefits will be limited to a lifetime maximum of \$2,500 for all causes. These benefits apply to each insured member of a family separately. All other provisions will continue to apply.

Special Note: If Alpha is reimbursing an individual for Medicare's Medical Insurance, the expense insurances described above will be coordinated with the Medicare Benefits so that there shall be no duplication of benefits.

Booklet for May 1, 1968, Plan at 14-15.

26. In 1969, the union submitted for consideration and negotiation a proposed insurance agreement that included, in relevant part, provisions for life insurance benefits to retired employees, and stated: "in the event of death of the insured from any cause, at any place, and at any time," . . . "[u]pon the death of the Retiree, coverage for his Dependents under the Program shall be continued as though such Retiree was living;" and

The benefits of the Prior Program for Employees, Retirees, and Dependents thereof, shall be applicable for any occurrence for which benefits were provided under the Prior Program prior to the Effective Date of the Program subject to all the provisions applicable to the Prior Program. Any insurance which as of the date immediately preceding the Effective Date of the Program is being continued during a layoff, leave of absence, illness, injury, disability, or retirement, in accordance with the Prior Program shall be adjusted on the Effective Date to reflect the benefits and coverages of the Program.

* * *

This Insurance Agreement shall become effective ____, 1969, and shall continue in effect until ____, 1971, during which period neither the Company nor the Union may demand any change in its provisions. After ____, 1971, the Insurance Agreement shall be automatically renewed for successive one-year periods unless either party to the Agreement has given written notice to the other at least sixty (60) days prior to ____, 1971 (or any subsequent anniversary of the Effective Date of the Agreement) of its desire to amend or modify this agreement.

See union-proposed 1969 Insurance Agreement at 1, 3, 9, 11.

27. The "safety and welfare" section of the Basic Agreement for 1969-1971 stated "[t]he group insurance plan in effect until May 1, 1969, will be amended as provided in Appendix 'A-69' attached." The Appendix set forth the following amendments related to benefits for retired employees:

Life Insurance for employees retired after May 1, 1969, shall be increased from \$2,500 to \$3,000.

* * *

Life Insurance for employees retired after May 1, 1970, shall be increased from \$3,000 to \$3,500.

* * *

The Dental Expense Insurance of any employee shall cease automatically upon the occurrence of . . . the employee's retirement.

There was no provision in the Basic Agreement stating that the Plan in effect would be "continued." The record does not reflect that benefits were not disbursed or received between 1969 and 1971. This Basic Agreement contained the same "term of agreement" provision as the 1967-1969 Basic Agreement, except

this Basic Agreement was effective from May 1, 1969, until May 1, 1971.

28. The booklet for the Plan as revised May 1, 1969, set forth the following provision regarding benefits for retirees:

Upon your retirement with the consent of the company, you may continue:

1. \$3,000 (\$3,500 if you retire after May 1, 1970) of your group life insurance, if you have completed 10 years of continuous service at the time of retirement.

2. Hospital expense, surgical expense and major medical expense insurances on yourself and your dependents. However, in a calendar year, hospital benefits will be limited to the hospital's regular charge for semi-private care for a total of 120 days. Surgical expense benefits may not exceed \$450 in a calendar year. Major medical expense benefits will be limited to a lifetime maximum of \$2,500 for all causes. These benefits apply to each insured member of a family separately. All other provisions will continue to apply.

Special Note: If Alpha is reimbursing an individual for Medicare's Medical Insurance, the expense insurances described above will be coordinated with the Medicare Benefits so that there shall be no duplication of benefits.

Booklet for May 1, 1969, plan at 24-25. This was the only provision in this booklet mentioning retirement benefits.

29. In 1971, the union again submitted for consideration a proposed "Insurance and Health Agreement." The proposed agreement contained the following relevant provisions:

Commencing on and after the Effective Date, the Company will provide for all Bargaining Unit Employees (hereinafter referred to as "Employees" or "Employee") and their Dependents and all Retirees and their

Dependents the Group Insurance Program set out herein. Insurance coverages under the Prior Program not hereinafter provided shall be continued to the extent applicable to Employees and their Dependents and Retirees and their Dependents in accordance with the provisions of the Prior Program as if fully set out herein and as the same may now or hereafter be amended, modified or supplemented in collective bargaining between the parties.

The benefits of the Prior Program for Employees, Retirees, and Dependents thereof, shall be applicable for any occurrence for which benefits were provided under the Prior Program prior to the Effective Date of the Program subject to all the provisions applicable to the Prior Program. Any insurance which as of the date immediately preceding the Effective Date of the Program is being continued during a layoff, leave of absence, illness, injury, disability, or retirement, in accordance with the Prior Program shall be adjusted on the Effective Date to reflect the benefits and coverages of the Program.

* * *

Life Insurance coverage for each Retiree, including disability retirees age 60 or more who have not elected either Option (2) or Option (3) under Section 2(a) of this Article, and each Employee who becomes totally and permanently disabled (as defined in the Pension Plan) after he attains age 60, shall be in the amount of \$10,000 payable in one sum to the beneficiary in the event of death of the insured from any cause, at any place, and at any time.

* * *

Upon the death of a Covered Family Member [defined as an employee, retiree, or dependents thereof], coverage for his Dependents under the Program shall be continued as though such Covered Family Member was living.

* * *

This Insurance and Health Agreement shall be effective from _____, 19____, to _____, 19____. In the event either party desires to amend, modify or terminate the Agreement such party may give appropriate notice sixty (60) days before the natural expiration date. In the event no such notice is given, the contract shall continue until such time as a sixty (60) day advance notice is given of a desire to amend, modify or terminate. If the action by either party desiring to alter the contract is to amend or modify the contract then all other provisions shall continue in full force and effect, except that the Union shall be permitted to strike in support of its proposed amendments or modifications and the employer, to the extent permitted by law, shall be permitted to lock out in support of its amendments or modifications, the provisions of any other contract between the parties to the contrary notwithstanding.

Union's proposed 1971 insurance agreement at 1, 3, 10, 13.

30. The Report of the Contract Negotiations between Alpha and the union for April 26, 1971, through April 30, 1971, states with respect to Alpha's closed plant at Ironton, that the Ironton group "have already received Medicare premiums and they are still in effect in the future." 1971 Report at 7.

31. The "safety and welfare" section of the Basic Agreement for 1971-1973 provided that "[t]he group insurance plan in effect until May 1, 1971, will be amended as provided in Appendix 'A-71' attached." The only provisions of that appendix explicitly directed to retirees stated:

The Company will continue to reimburse the cost of Medicare premiums, including any subsequent increase in premiums, for those eligible, active or retired including their spouses as long as the Medicare benefits are coordinated with the Company group insurance plan.

An employee who is eligible to retire under the terms of the disability retirement pension shall not be required to retire until he has exhausted his weekly accident and sickness disability benefits (52 weeks).

There was no provision stating that the Plan then existing would "continue." The record does not reflect that benefits were not disbursed or received between 1971 and 1973. The Basic Agreement further provided that upon ratification by the union's locals, the agreement would

. . . become effective and remain in full force and effect and be binding upon the parties hereto from May 1, 1971 to and including April 30, 1973, and it shall continue in full force and effect thereafter from year to year until either party on or before March 1, of any year, beginning March 1, 1973, gives written notice to the other party of its desire or intention either to alter or modify or to terminate the same. If such notice is given, the parties hereto shall begin negotiations not later than March 31 in such year and this Agreement shall continue in full force and effect until completion and signing of a new agreement, provided, however, that after such negotiations have continued without reaching an Agreement until May 1 in any year, then either party may terminate this Agreement, at any time thereafter upon notice.

32. In the May 1, 1971, Plan booklet the "purpose" section explicitly stated that the "benefits and provisions of the group insurance plan in effect prior to the [listed] dates shall continue. This booklet explains the plan on and after the [listed] dates." Booklet for May 1, 1971, Plan at 3. For retirement benefits, the 1971 Plan booklet explained:

Upon your retirement with the consent of the company, on or after May 1, 1971, you may continue:

1. \$4,000 of your group life insurance, if you have completed 10 years of continuous service at the time of retirement.

2. Hospital expense, surgical expense and major medical expense insurances on yourself and your dependents. However, in a calendar year, hospital benefits will be limited to the hospital's regular charge for semi-private care for a total of 120 days. Surgical expense benefits may not exceed \$495 in a calendar year. Major medical expense benefits will be limited to a lifetime maximum of \$3,000 for all causes. These benefits apply to each insured member of a family separately. All other provisions will continue to apply.

Special Note: If Alpha is reimbursing an individual for Medicare's Medical Insurance, the expense insurances described above will be coordinated with the Medicare Benefits so that there shall be no duplication of benefits.

The Company will continue to reimburse the cost of these Medicare premiums, including any subsequent increase in premiums, for those eligible, active or retired including their spouses as long as the Medicare benefits are coordinated with the Company group insurance plan.

Booklet for 1971 Plan at 24-25.

33. The Plan booklets for 1963, 1968, 1969, and 1971 stated (a) the entire cost of the Plan was paid by Alpha; (b) “[t]he group insurance contract is between [Alpha and Equitable]. In accordance with this contract a certificate will be issued to you. This certificate contains complete details of the benefits provided under this plan;” and (c) “[g]roup insurance for you and your dependents terminates upon termination of your active service[,]” except as discussed within the booklet. 1963 Plan Booklet at 1, 13, 15; 1968 Plan Booklet at 1, 14, 15; 1969 Plan Booklet at 3, 23, 25; 1971 Plan Booklet at 3, 23, 25.

34. The Plan booklets issued in 1956, 1961, 1963, 1968, 1969, and 1971 stated that Equitable would determine the amount covered for cutting operations not listed in the Plan. 1956 Plan

Booklet at 10; 1961 Plan Booklet at 7; 1963 Plan Booklet at 7; 1968 Plan Booklet at 7; 1969 Plan Booklet at 9; 1971 Plan Booklet at 9.

35. Beginning in 1973, the collective bargaining agreements (CBA) negotiated by Alpha and the union contained as an appendix a separate Insurance and Health Agreement (Agreement) that contained the terms of the Plan. Copies of the Agreement were distributed to all employees in pocket-sized benefit booklets. Each Agreement was prepared by the Personnel Manager of Alpha's cement division, Robert J. Bonstein, and sent to the union for review and approval before it became effective. The Agreement was based on the proposed insurance agreements previously submitted by the union, as drafted by Thomas Miechur, the international union's president. Mr. Miechur (by deposition) and Mr. Bonstein testified that they understood retiree welfare benefits were not guaranteed beyond the term of the Agreement and could terminate upon the Agreement's expiration. The 1973, 1975, and 1978 Agreements do not specifically mention Equitable.

36. The 1973 CBA stated that "[t]he group insurance plan in effect until April 30, 1973, will be amended as provided in Appendix 'A-73' attached." That Appendix was the Insurance and Health Agreement for 1973. The 1973-1975 CBA provided as its "term of agreement:"

After ratification by the members of the Local Unions this Agreement shall become effective and remain in full force and effect and be binding upon the parties hereto from May 1, 1973 to and including April 30, 1975, and it shall continue in full force and effect thereafter from year to year until either party on or before March 1, of any year, beginning March 1, 1975, gives written notice to the other party of its desire or intention either to alter or modify or to terminate the same. If such notice is given, the parties hereto shall begin negotiations not later than

March 31 in such year and this Agreement shall continue in full force and effect until completion and signing of a new agreement, provided, however, that after such negotiations have continued without reaching an Agreement until May 1 in any year, then either party may terminate this Agreement, at any time thereafter upon notice.

37. The terms of the 1973 Agreement explicitly referred to retirement benefits in numerous sections:

Commencing on and after the Effective Date, except as stated otherwise, the Company will provide for . . . all Retirees, retired on or after the Effective Date, and their Dependents the Group Insurance Program set out herein. Insurance coverages under the Prior Programs not hereinafter provided shall be continued to the extent applicable to Retirees and their Dependents in accordance with the provisions of the Prior Programs as if fully set out herein and as the same may now or hereinafter be amended, modified or supplemented in collective bargaining between the parties.

The benefits of the Prior Program for Employees, Retirees and Dependents thereof, shall be applicable for any occurrence for which benefits were provided under the Prior Program prior to the Effective Date of the Program subject to all the provisions applicable to the Prior Program. . . .

* * *

The Company shall pay all premium costs to finance the Program. No Employee, Retiree, retired on or after the Effective Date, or any Dependent thereof, shall be required to make any contributions or premium payments to the Program.

* * *

[With respect to coordination of benefits, if] a retiree is insured under his present employer's plan, his present employer's plan pays first. . . .

* * *

Life insurance coverage for each Retiree, including disability retirees who have completed 10 or more years of continuous service at the time of retirement and are retired on or after the Effective Date, shall be in the amount of \$4,000 payable in one sum to the beneficiary in the event of death of the insured from any cause, at any place, at any time, while insured.

Life Insurance coverage for each Retiree, including disability retirees, retired before the Effective Date, shall continue in the same amount for which he was insured prior to the Effective Date.

* * *

[For Basic Hospital-Surgical-Medical Benefits,] [i]f a female Employee or the wife of a male Employee or Retiree becomes confined in a hospital on account of a pregnancy, the benefit payable for such person shall be in an amount equal to the reasonable and customary charges for which coverage is provided in the preceding paragraphs . . . of this Section subject to an overall maximum of \$242.00. The overall maximum of \$242.00 does not apply on and after May 1, 1974.

* * *

Basic hospital and surgical benefits will be continued on Retirees who have completed 10 or more years of continuous service at the time of retirement, and their Dependents. However in a calendar year, hospital benefits will be limited to 120 days and surgical benefits will be limited to a maximum of \$495 in accordance with schedule #1 attached.

The benefits described in Sections (1) and (2) of this Article VI, which become effective on May 1, 1974, will be continued on Retirees:

- (1) retired on and after May 1, 1974 and
- (2) who have completed 10 or more years of continuous service.

and their Dependents.

* * *

Major Medical Expense coverage for Retirees and their dependents including disability retirees, who have 10 or more years of continuous service at the time of retirement and are retired on or after May 1, 1974, shall be in the amount of \$5,000. Major Medical coverage for those retired prior to the Effective Date shall continue in the same amount for which they were insured prior to the Effective Date. There shall be no reinstatement after retirement.

1973 Agreement at 1, 2, 3, 5, 10, 24, and 29. The Agreement also stated that accidental death and dismemberment insurance; sickness and accident (weekly indemnity) benefits; basic diagnostic benefits; and dental care benefits, terminated upon retirement. *Id.* at 7, 8, 25, 33. Furthermore, the 1973 Agreement expressly stated:

This Insurance Agreement shall become effective May 1, 1973, and shall continue in effect until May 1, 1975, during which period neither the Company nor the Union may demand any change in its provisions.

After May 1, 1975, the Insurance Agreement shall be automatically renewed for successive one-year periods unless either party to the Agreement has given written notice to the other at least sixty (60) days prior to May 1, 1975 (or any subsequent anniversary of the Effective Date

of the Collective Bargaining Agreement) of its desire to amend or modify this Agreement.

Id. at 40-41.

38. The 1975-1978 CBA stated that “[t]he group insurance plan in effect until April 30, 1975 will be amended as provided in Appendix ‘A-75’ attached.” That appendix contained the Insurance and Health Agreement as amended May 1, 1975. The 1975-1978 CBA contained the same “term of agreement” provision as the 1973-1975 CBA, except that the period ran from May 1, 1975, to April 30, 1978, rather than from 1973-1975.

39. The terms of the 1975 Agreement explicitly referred to retirement benefits in several sections:

Commencing on and after the Effective Date, except as stated otherwise, the Company will provide for all . . . Retirees, retired on or after the Effective Date, and their Dependents the Group Insurance Program set out herein. Insurance coverages under the Prior Programs, not hereinafter provided shall be continued to the extent applicable to Retirees and their Dependents in accordance with the provisions of the Prior Programs as if fully set out herein and as the same may now or hereinafter be amended, modified or supplemented in collective bargaining between the parties.

The benefits of the Prior Program for Employees, Retirees and Dependents thereof, shall be applicable for any occurrence for which benefits were provided under the Prior Program prior to the Effective Date of the Program subject to all the provisions applicable to the Prior Program. . . .

* * *

. . . No employee, Retiree, retired on or after the Effective Date, or any Dependent thereof, shall be required to make any contributions or premium payments to the Program.

* * *

[With respect to coordination of benefits,] [i]f a retiree is insured under his present employer's plan, his present employer's plan pays first.

* * *

Life insurance coverage for each Retiree, including disability retirees who have completed 10 or more years of continuous service at the time of retirement and are retired on or after the Effective Date, shall be in the amount of \$4000 payable in one sum to the beneficiary in the event of death of the insured from any cause, at any place, at any time, while insured. Life insurance coverage for each Retiree, including disability retirees, retired before the Effective Date, shall continue in the same amount for which he was insured prior to the Effective Date.

An Employee shall have the same rights and benefits with respect to any portion of his life Insurance terminated due to retirement on pension as though such portion had terminated due to termination of employment.

* * *

Basic hospital and surgical benefits described in Sections 1. and 2. (a) of this Article VI, will be continued on Retirees, who have completed 10 or more years of continuous service at the time of retirement, and their Dependents.

The benefits described in Sections 1. and 2. (b) of this Article VI, which become effective on May 1, 1976, will be continued on Retirees:

- (1) retired on and after May 1, 1976 and
- (2) who have completed 10 or more years of continuous service.

and their Dependents.

* * *

Major Medical Expense Benefits for Retirees and their dependents including disability retirees, who have 10 or more years of continuous service at the time of retirement shall be in the amount of \$5,000. Major Medical coverage for those retired prior to the Effective Date shall continue in the same amount for which they were insured prior to the Effective Date. There shall be no reinstatement after retirement.

Employees retiring on or after May 1, 1976 and their Dependents will have their Major Medical Expense Benefits continued as described in Section 8. (a) above and will be eligible for the ninety percent reimbursement feature effective on such date.

1975 Agreement at 3, 4, 5, 8-9, 24, 29. That Agreement further stated that accidental death and dismemberment insurance; sickness and accident (weekly indemnity) benefits; basic diagnostic benefits; and dental expense benefits, terminated upon retirement. *Id.* at 10, 12, 25, 34.

With respect to its term, the 1975 Agreement provided that:

This Insurance Agreement shall become effective May 1, 1975, and shall continue in effect until May 1, 1978, during which period neither the Company nor the Union may demand any change in its provisions.

After May 1, 1978, the Insurance Agreement shall be automatically renewed for successive one-year periods unless either party to the Agreement has given written notice to the other at least sixty (60) days prior to May 1, 1978 (or any subsequent anniversary of the Effective Date of the Basic Agreement) of its desire to amend or modify this Agreement.

Id. at 46.

40. The 1978-1981 CBA stated that “[t]he group insurance plan in effect until April 30, 1978 will be amended as provided in Appendix ‘A-78’ attached.” That appendix contained the Insurance and Health Agreement as amended May 1, 1978. The 1978-1981 CBA contained the same “term of agreement” provision as the 1973-1975 and 1975-1978 CBAs, except that the relevant time period ran from May 1, 1978, to April 30, 1981.

41. The provisions of the 1978 Agreement included retired employees as follows:

Commencing on and after the Effective Date, except as stated otherwise, the Company will provide for . . . all Retirees, retired on or after the Effective Date, and their Dependents the Group Insurance Program set out herein. Insurance coverages under the Prior Programs not hereinafter provided shall be continued to the extent applicable to Retirees and their Dependents in accordance with the provisions of the Prior Programs as if fully set out herein and as the same may now or hereinafter be amended, modified or supplemented in collective bargaining between the parties.

The benefits of the Prior Program for Employees, Retirees and Dependents thereof, shall be applicable for any occurrence for which benefits were provided under the Prior Program prior to the Effective Date of the Program subject to all the provisions applicable to the Prior Program. . . .

* * *

. . . No Employee, Retiree, retired on or after the Effective Date, or any Dependent thereof, shall be required to make any contributions or premium payments to the Program.

* * *

[With respect to coordination of benefits,] [i]f a Retiree is insured under his present employer's plan, his present employer's plan pays first. . . .

* * *

Life insurance coverage for each Retiree, including disability retirees who have completed 10 or more years of continuous service at the time of retirement and are retired on or after the Effective Date, shall be in the amount of \$4000 payable in one sum to the beneficiary in the event of death of the insured from any cause, at any place, at any time, while insured. Life insurance coverage for each Retiree, including disability retirees, retired before the Effective Date, shall continue in the same amount for which he was insured prior to the Effective Date.

An Employee shall have the same rights and benefits with respect to any portion of his Life Insurance terminated due to retirement on pension as though such portion had terminated due to termination of employment.

* * *

Basic Hospital and Surgical Benefits described in Sections 1 and 2 of this Article VI, will be continued on Retirees and their dependents including disability retirees:

- (1) retired on and after May 1, 1976 and
- (2) who have completed 10 or more years of continuous service.

* * *

Major Medical Expense Benefits for Retirees and their dependents including disability retirees:

- (1) retired on and after May 1, 1976 and
- (2) who have completed 10 or more years of continuous service

shall be in the amount of \$5,000. Major Medical coverage for those retired prior to the Effective Date shall continue in the same amount for which they were insured prior to the Effective Date. There shall be no reinstatement after retirement.

1978 Agreement at 3, 4, 5, 8-9, 16, 21-22. The 1978 Agreement further stated that accidental death and dismemberment insurance; sickness and accident (weekly indemnity) benefits; basic diagnostic benefits; and dental expense benefits, terminated upon retirement. *Id.* at 11, 12, 17, and 26. With respect to its term, the 1978 Agreement provided that:

This Insurance Agreement shall become effective May 1, 1978, and shall continue in effect until May 1, 1981, during which period neither the Company nor the Union may demand any change in its provisions.

After May 1, 1981, the Insurance Agreement shall be automatically renewed for successive one-year periods unless either party to the Agreement has given written notice to the other at least sixty (60) days prior to May 1, 1981 (or any subsequent anniversary of the Effective Date of the Basic Agreement) of its desire to amend or modify this Agreement.

Id. at 39.

42. The 1973, 1975, and 1978 Agreements defined "Retiree" as "any person who is receiving a pension or disability benefit under the terms and provisions of the Pension Plan." 1973 Agreement at 40; 1975 Agreement at 46; 1978 Agreement at 39.

43. The 1975 and 1978 Agreements also contained an article captioned "Prior Program Benefits." Article XI, 1975 Agreement at 35-38; Article XII, 1978 Agreement at 28-31. In particular, Section 1 of the Articles specified that "[t]he benefits continued on Retirees (and their dependents, as applicable) who retired prior to May 1, 1975 [or 1978] are those which were in ef-

fect at the time the individual retired[.]” 1975 Agreement at 35; 1978 Agreement at 28. Section 2 of the Articles itemizes all such prior benefits by listing the type of benefit, the amount of coverage, the effective dates of each such coverage, and the relevant amount of employment service required for a retiree to qualify for such coverage. 1975 Agreement at 35-38; 1978 Agreement at 28-31. Section 3 of the Articles stated that sickness and accident (weekly indemnity) benefits, medical benefits, and basic diagnostic benefits and dental expense benefits are not continued after retirement. 1975 Agreement at 38; 1978 Agreement at 31.

44. In 1978, Alpha provided hourly employees with a “red-book,” containing in relevant part the summary plan description (SPD) for the Plan. With respect to retirement, the Plan’s SPD provisions stated:

[that] [t]he Plan as described in this summary applies to those actively employed or who retire on or after May 1, 1978.

* * *

Converting Your Coverage — When you terminate or retire from the Company, you have 31 days during which you may convert your Company-sponsored life insurance to an individual policy. You will be able to make the conversion without a medical review. Your individual coverage can be for any amount from \$500 up to the amount of coverage you had before you terminated.

Retirement Coverage — If you leave the Company due to retirement and have 10 or more years of service you will continue to receive \$4,000 in Company-sponsored life insurance.

* * *

Retirement — If you retire with 10 or more years of service on or after May 1, 1976, you will continue to receive the

Hospital/Surgical and Major Medical portion of plan coverage. Coverage will continue for the remainder of your life. However, the Major Medical lifetime maximum for retirees and their dependents is \$5,000. This maximum CANNOT be reinstated. All other health expense coverages stop at retirement.

* * *

Plan Sponsor — . . . all contributions to the Plan are made by Alpha and its retired hourly employees.

* * *

Other Summaries — The insurance and health benefits applicable to retirees who retired prior to May 1, 1976, are described in other Summary Plan Descriptions.

1978 SPD at i, 2, 12, 15, 17.

45. During 1980 and 1981, Alpha's cement division had a multi-million dollar operating loss and multi-million dollars worth of trade payables. Additionally, during recent years, Alpha had not complied with covenants in its loan agreements. Alpha unsuccessfully tried to sell its cement assets and the Slatery subsidiary to help offset the apparent financial crisis. In early 1981, Alpha shut down or sold four of its remaining cement plants.

46. In 1981, by agreement of Alpha and the union, the terms of the 1978 Plan were extended through April 30, 1982.

47. In the fall of 1981, Alpha sought to terminate retiree benefits by an agreement with the union to amend the then-effective 1978 Plan and CBA prior to their expiration dates. In February 1982, there were meetings with union locals at Alpha's two remaining cement plants to discuss such an amendment. One local voted to reject the proposed amendment.

48. At meetings with locals at closing plants, Neil Werkheiser, manager of industrial relations, informed union

representatives there was little likelihood the insurance benefits would continue due to the financial problems, and that retirees may want to form common groups with which to obtain insurance.

49. On March 29, 1982, Alpha sent a letter to all Alpha hourly retirees notifying them that Alpha was cancelling their insurance coverage effective May 1, 1982. Enclosed with each letter was a conversion form to be used in the event anyone desired to convert the health coverage to an individual policy with Equitable.

50. In response to retirees' inquiries, Thomas Miechur sent letters stating in relevant part:

The termination of the retirees' insurance coverage by the company is a traumatic experience for all retirees. I fully understand the impact the termination of insurance benefits has on retirees, and I wish there was something that could be done to provide continued coverage, but under the circumstances there is nothing that the Union can do. There is nothing in the collective bargaining agreement itself, or in the Insurance and Health Agreement which guarantees retirees' benefits for life, nor is there any language in these agreements that talks about vesting of these benefits, and these benefits will expire of their own force on May 1, 1982.

Pensions, unlike health and welfare benefits, are paid from an actuarially predetermined fund and are guaranteed for life. Health and welfare benefits are negotiated periodically and are paid for by the employer contributions and last only for the life of a collective bargaining agreement.

51. On or about May 1, 1982, Alpha ceased providing, under the Plan or otherwise, life insurance or health benefits to retirees and their covered family members for any period from and after May 1, 1982.

52. On April 30, 1982, the Plan and CBA then in effect expired.

53. On May 28, 1982, Alpha, the international, and the local at Lime Kiln executed a Memorandum of Agreement which expressly stated that the terms of the 1978 Basic Agreement, "excluding insurance coverage for all retirees," would be continued.

54. During strikes in 1957 and 1965, insurance coverage continued for retired employees.

55. During "hiatus" periods, when one contract expired and Alpha and the union had not yet entered into a new contract, Alpha continued to provide insurance benefits under the terms of the expired contract, purportedly based on agreements that the expired contract's terms would continue in force.

56. In recent years, including late 1981, Alpha sent retirees a letter describing benefits, and stating in relevant part:

Your life insurance will be continued in the amount of \$4,000. The balance of your life insurance will be continued until 31 days from your retirement date. Until then, you may convert it to an individual policy without the necessity of a physical examination. Application may be made by completing the enclosed Notice of Conversion Privilege form. Alpha group hospital and surgical insurances for you and your eligible dependents will be continued. Hospitalization benefits will be limited to the hospital's regular charge for semi-private care for a total of 365 days. Surgical benefits will be paid on a regular and customary basis. Major medical expense benefits will be provided up to a lifetime maximum of \$5,000. These maximums apply to you and your eligible dependents separately. Our plan does not permit continuance of weekly indemnity, basic diagnostic expense and dental expense benefits. When an individual attains age 65 (in some cases

sooner where a disabled individual is entitled to monthly cash benefits under the Social Security Program), he (or she) is eligible for Social Security's Medicare Program. The hospital, surgical and major medical benefits described above will be reduced by any benefits payable by Medicare. We strongly urge that you subscribe to the voluntary portion of Medicare; that is the part that costs \$11.00 per month. This part of Medicare is also used as an offset against the Alpha benefits. Therefore, it is important that you and your spouse subscribe for the full Medicare Program when eligible. Alpha will reimburse you for the \$11.00 cost, upon receipt of a copy of your Medicare card. Reimbursement will be included in your pension check.

57. There was conflicting testimony regarding whether or not Alpha's representatives orally told employees that their insurance benefits continued "for life" or "until death" of the employees. Union members, including those involved in negotiating the 1975 and 1978 Agreements, testified that a now-deceased company representative made such statements. The details of the circumstances of such statements or conversations were not recalled by the witnesses. Company representatives testified they had not personally made or heard such statements.

58. Mr. John Hickey, an employees benefit consultant for Kwasha Lipton (the company that prepared the 1978 SPD for Alpha), testified as an expert witness for Alpha and the Plan. Mr. Hickey noted it was not a customary practice in the industry either to put aside money for future retiree claims under health and welfare benefit plans or to recognize future claims as a liability on corporate books. Mr. Hickey also acknowledged that after 1975, the effective date of ERISA, it was customary practice to state explicitly in the relevant documents that retiree benefits were payable beyond the term of a collective bargaining agreement, where such payments were intended. Mr. Hickey further noted that during the late 1970s, it would have been a

good practice to state expressly how plant closings, etc., might affect retiree health and life insurance benefits, but such was not the industry practice. During cross-examination, Mr. Hickey acknowledged he would have drafted the 1978 SPD differently.

59. In 1974, Alpha became self-insured with respect to benefits for Medical and health care.

60. As amended, the 1978 Plan provided life insurance, accidental death and dismemberment insurance, and sickness and accident insurance benefits through group insurance policies issued to Alpha by Equitable. Hospital, surgical, medical, basic diagnostic, major medical and dental benefits were provided through an Administration Agreement between Alpha and Equitable. Equitable's involvement with Alpha's group health insurance was that of an agent to Alpha. Pursuant to the terms of a written plan, Equitable processed claims and made disbursements through the Administration Agreement by means of a special account funded periodically by Alpha in an amount sufficient to cover current health care costs. Under the Agreement, Alpha was to determine the eligibility of the claimants and to review Equitable's initial determinations respecting payment of benefits.

61. By the end of 1982, all of Alpha's cement plants were closed.

Conclusions of Law

1. This Court has jurisdiction over this matter pursuant to 29 U.S.C. § 1132(f) and 29 U.S.C. § 185(a).

2. If the retirees' life and health insurance are vested benefits, then the benefits may not be terminated without the retirees' consent. *See, e.g., Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1971). Unlike pension benefits, health and life insurance benefits do not vest as a matter of law. *See Molnar v. Wibbelt*, 789 F.2d 244, 250

(3d Cir. 1986); *compare* 29 U.S.C. § 1053 (each pension plan shall provide employee's right to benefit is nonforfeitable upon attainment of normal retirement age) *with* 29 U.S.C. § 1051(1)(excluding employee welfare benefit plan from such requirement). In practical terms, there is merit to such a distinction. With some degree of accuracy, the need for funds for and the extent of potential claims against a pension plan may be determined. For example, the length of employment and the employee's salary are determinable. This is not true of health and life insurance benefits. The funding needs of a health insurance plan are more difficult to estimate because one insured individual, in comparison to another insured individual, may have a larger number of claims or a claim for more costly service or no claims at all. In the case of life insurance, there is a certainty the insured will die but an uncertainty as to when the death will occur. Providing this coverage then presents the worst of both worlds.

3. If the life and health insurance benefits are unambiguously limited to the term of the relevant agreement, then the benefits are not vested. *See Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984). Benefits may, however, outlast the agreement under which they arose if the parties so intended. *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964); *District 29 United Mine Workers of America v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985); *Food & Commercial Workers Local 150A v. Dubuque Packing Co.*, 756 F.2d 66, 69-70 (8th Cir. 1985).

4. Thus, the issue is one of contract interpretation, *Royal Coal Co.*, *supra*, 768 F.2d at 590; and, if necessary, a consideration of the relevant extrinsic evidence and the parties' course of dealing, *Dubuque Packing Co.*, *supra*, 756 F.2d at 69, 70. *See International Union, UAW v. Yard Man, Inc.*, 716 F.2d 1476, 1479-80 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

5. Plaintiffs have the burden "to show that the parties intended retirees' benefits would be vested and not tied to the agreement which created them." *Dubuque Packing Co.*, *supra*, 756 F.2d at 70.

6. Plaintiffs contend the 1978 Plan, as extended, clearly provides retirees' lifetime benefits. Plaintiffs urge language explicitly continuing prior programs is not language limiting the benefits to the duration of the agreement, but is language assuring that prior benefits would continue. Plaintiffs also urge: (a) the "until death" language of the 1965 Basic Agreement appendix, effective in 1966, was never altered by subsequent Agreements or the parties' conduct; (b) the "term of agreement" provisions in the Agreements demonstrate the parties' intent to improve, not terminate, the Plan, particularly in light of explicit statements in the Plan that certain benefits "terminate" upon retirement; and (c) through letters, the 1978 SPD, and oral representations, Alpha advised retirees they would receive benefits for life. Plaintiffs direct the Court's attention also to Alpha's past continuation of benefits for retirees during strikes by active employees, during hiatus periods, and under former terms of the Plan even when early Plan booklets or CBAs failed explicitly to state that former plan provisions continued.

Alpha defendants counter that the 1973, 1975, and 1978 Plans' explicit reaffirmation of the terms of earlier Plans and the Plans' express "term of agreement" provisions indicate an intent that the benefits were tied to the term of the relevant Plan. Moreover, these defendants urge none of the Plans specify that the benefits were vested or lasted either "for life" or "until death." Alpha defendants interpret the "until death" provision in the Plan effective in 1966 as simply a provision rejecting the union's demand that coverage of the retiree's dependents continue after the retiree's death. Alpha defendants urge that the coordination of benefits provisions, first agreed upon in 1966, actually reduced payments made by Alpha and received by class members, yet no one then urged such benefits could not be reduced because they were vested or otherwise received for life.

7. The language of the Insurance and Health Agreements collectively bargained by Alpha and the union beginning in 1973

reflected the intent of the parties to limit retiree coverage for persons covered by those agreements to the term of the currently effective Agreement:

(a) The Agreement specifically reaffirmed benefits of past retirees and earlier Plans stating that benefits previously provided would "continue" or "be continued" under the current agreement. Moreover the 1975 and 1978 Agreements each contained an article specifying the prior benefits that continued. *Dubuque Packing Co.* is factually distinguishable. *Dubuque Packing Co., supra*, 756 F.2d at 69-70. In that case, the Eighth Circuit determined that the parties intended benefits to continue beyond the agreement's terms. In particular, the Eighth Circuit found that, unlike prior agreements, the most recent agreement did not contain provisions extending benefits to employees who retired before the agreement's effective date and there was no explanation for the omission. *Id.* at 69. Here, the clear inclusion of provisions reiterating the continuation of prior benefits and earlier Plan programs persuades the Court that *Dubuque Packing Co.* does not require a finding for plaintiffs.

(b) The Agreements, rather than providing that retiree benefits are fixed forever, provided for continuation of "insurance coverages under the Prior Programs . . . as the same may now or hereafter be amended, modified or supplemented in collective bargaining between the parties." This provision for changes is not consistent with a conclusion that the benefits would continue beyond the Agreement's expiration date. *Struble v. New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325, 330 (3rd Cir. 1984).

(c) The Agreements contained a duration clause explicitly limiting their duration. Here, as in *International Union (UAW) v. Roblin Industries*, 561 F.Supp. at 288, 298 (W.D.Mich. 1983), a provision limiting the period for which plan benefits would be "continued" is a clear indication that the benefits were provided only for the "effective" term of the agreement. See also *Royal Coal Co., supra*, 735 F.2d at 126; *Struble, supra*

732 F.2d at 330. The inclusion of such language also makes this present case different from the cases upon which plaintiffs rely. *See Roblin Industries, supra*, 561 F.Supp. at 298-99.

(d) The coordination of benefits provision in the Agreements, which reduced benefits payable by Alpha to those already retired, is inconsistent with an interpretation that retiree welfare benefits were vested. This coordination provision applied to all retirees, not just to those retiring after the effective date of the Memorandum of Understanding. Because separate provisions of the contract must be interpreted in such a way as to render them consistent if at all possible, e.g., *Yard Man, Inc., supra*, 716 F.2d at 1479-80, the Plan cannot be interpreted to provide vested rights for prior retirees in one provision and to take such rights away in another.

8. Moreover, the parties' conduct in the face of Alpha's plant closings evince the parties' intention that retiree benefits did not continue beyond the expiration date of each Agreement. Alpha sought an agreement in 1981 that would terminate retiree benefits; at least one of the remaining locals voted on that proposed amendment in early 1982; and, after the extended 1978 Plan expired, the remaining local and Alpha agreed that all agreed upon provisions, except retirees' benefits, would be extended.

9. The Court is troubled by terms in the Summary Plan Description, in letters to retirees, and in alleged oral statements to Alpha's employees indicating that insurance benefits would continue for life. Alpha urges that (a) this language is limiting, e.g., it limits benefits granted to retirees' dependents; and (b) that such language indicated Alpha's expectation to provide retirees with benefits for life based on an expectation Alpha would continue producing cement and entering into CBAs providing for retiree benefits. Based on the clarity of the most recent health and insurance agreements in providing language reaffirming earlier Agreement provisions and retirement benefits and in providing restricted duration provisions, and on

the parties' conduct in 1981 and 1982, the Court does not give great weight to such phrases under the circumstances presented here.

10. The Court is also not persuaded by plaintiffs' argument that lifetime benefits are granted by the phrase "until death," found in the 1965 CBA Appendix. This is the first and only time the phrase appeared in the parties' twenty-five year history of negotiating for retirement insurance benefits. The fact that this very clear phrase was not used again implies that the change, if any, provided by it was the subject of bargaining. While the Court concurs with defendant Alpha's position that the "until death" phrase probably signified a direct rejection of the union's submitted proposal to continue dependent benefits after a retiree's death, at the same time it implies that those benefits would continue through the retiree's lifetime, and thus, as plaintiffs contend, beyond the Agreement's terms. *Cf. Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 614-15, 616 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 1202 (1986). In light of subsequent Agreements' provisions and the parties' later conduct, however, the Court finds this unique phrase is not significant for purposes of construing the more recent Agreements.

11. Plaintiffs' efforts to characterize Alpha defendants' liability in terms of breach of fiduciary duty, *see* 29 U.S.C. §§1104 and 1106, or in terms of nondisclosure of benefits at the end of the contract, *see* 29 U.S.C. §1102, are not persuasive and will not now be considered because plaintiffs did not plead these causes of action and they were not tried by consent.

12. Plaintiffs joined Equitable in these proceedings as a "party in interest," defined in §3(14)(B) of ERISA, 29 U.S.C. §1002(14)(B), as including persons providing services to the Plan, and as a necessary party under Rule 19 of the Federal Rules of Civil Procedure. However, the fact that one may have been a "party in interest," as that term is used in ERISA, does not alone make one a necessary party in civil actions to enforce rights under the Act. *Boyer v. J.A. Majors Co. v. Employee*

Profit Sharing Plan, 481 F.Supp. 454, 458 (N.D. Ga. 1979). Plaintiffs also contend that Equitable is a fiduciary as that term is defined in ERISA, 29 U.S.C. §1002(21). However, Equitable's payment of health care claims pursuant to the provisions of the Plan from funds provided periodically by Alpha under the Administration Agreement does not clothe Equitable with discretionary authority over management of Plan assets or over the administration of the Plan to such an extent that Equitable's role was that of a fiduciary. *Austin v. General American Life Insurance Co.*, 498 F.Supp. 844, 846 (N.D. Ala. 1980)(no claim under ERISA against mere insurer); cf. *Chicago Board of Options Exchange v. Connecticut General Life Insurance Co.*, 713 F.2d 254, 259 (7th Cir. 1983)(liability to amend annuity contract may render insurance company a fiduciary); *Wolfe v. J.C. Penney Co., Inc.*, 710 F.2d 388, 394 (7th Cir. 1983). Equitable had no discretion to pay or decline a claim. No one contends, nor is there evidence to suggest, that Equitable had any role, discretionary or otherwise, in Alpha's decision to terminate the Plan.

Accordingly, judgment will be entered in favor of defendants and against plaintiffs. See *District 29, UMW v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985); *Struble, suprs*, 732 F.2d at 330-31; *Turner v. Local Union No. 302, Int'l Bro. of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 604 F.2d 1219, 1222-26 (9th Cir. 1979). The parties' motions for directed verdict will be denied.

Dated this 30th day of September, 1986.

/s/ William C. Hungate
United States District Judge

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 86-2483EM

**Robert Anderson, Jr., et al,
Appellants,**

vs.

**Alpha Portland Industries, Inc., etc., et al.
Appellees.**

**Appeal from the United States District Court
for the Eastern District of Missouri.**

**Appellants' petition for rehearing en banc has been con-
sidered by the Court and is denied.**

Appellants' petition for rehearing by the panel is also denied.

March 14, 1988

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX D
TEXT OF STATUTES CITED

29 U.S.C. § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

**SUBCHAPTER I—PROTECTION OF
EMPLOYEE BENEFIT RIGHTS**

Subtitle A—General Provisions

29 U.S.C. § 1001. Congressional findings and declaration of policy

(a) Benefit plans as effecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employees, employee

organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for

appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C. § 1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1)

of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

APPENDIX E

LIST OF PETITIONERS

Robert Anderson, Jr.	Harry C. Scurlock, Sr.
Louis Bank	Leroy C. Seitz
Eugene L. Berg	Leroy H. Simmons
James S. Bartelsmeyer	William Stafford
Howard Brust	Eugene L. Turner
Raymond E. Copman	Fred A. Walsh
John Crittendon	Eugene Weibking
James L. Davis, Sr.	James D. Williams
Robert F. DeGroot	Charles Zadow
Mathew L. DeLarber	William B. Fischer
Roland E. Doyle	Charles M. Gapsch
Melvin C. Doyle	Carl McCoy Coleman, dec'd
Leslie M. Dunard	Steve H. Dugan
William J. Ehrenreich	Lilburn C. DeGeare, dec'd
Frank D. Gardner	Jack Ratty
James Gurley, dec'd	Edward A. Moeller
Victor O. Hoffmann	Louis F. Franke, dec'd
James W. Holman	Stephen C. Siebenmorgen
Sidney J. Holman	Orville Usher
William j. Huighe	James P. Carter
Richard H. Juergens	Ken Spangenberg
Oliver Karg, Jr.	T. B. Whitener
Harry W. Kendall	Max W. Scheibe, dec'd
Joseph E. Krejci	Chester W. Williams
Arthur L. Marquardt	Thomas M. Argenbright, dec'd
Melvin V. Meinz	Simon Kirn
Leo H. Moll	Walter Lillicrap
Oliver D. Oglesby	Frank Mesplay
Delbert Price	Roy W. Morrison, Sr.
Tillman Ratty	Adolph F. Schremp
Albert L. Reece	George F. Winch
John L. Rosener	Clarence E. Wright
August H. Rosener	Leonard F. Verble
Donald R. Rosso	Donald S. Lillicrap, dec'd
Albert M. Scheig	

